RECORD AND BRIEFS

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In The
Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and
STATE OF COLORADO,

Defendants.

On Motion To Dismiss Complaint

BRIEF OF HUDSPETH COUNTY CONSERVATION AND RECLAMATION DISTRICT NO. 1 AS AMICUS CURIAE IN OPPOSITION TO NEW MEXICO'S MOTION TO DISMISS

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BRIEF OF HUDSPETH COUNTY CONSERVATION AND RECLAMATION DISTRICT NO. 1 AS AMICUS CURIAE IN OPPOSITION TO NEW MEXICO'S MOTION TO DISMISS

INTEREST OF AMICUS CURIAE HUDSPETH COUNTY CONSERVATION AND RECLAMATION DISTRICT NO. 1[1]

The Hudspeth County Conservation and Reclamation District No. 1 ("HCCRD"), a conservation and reclamation district of the State of Texas established under Article XVI, § 59, of the Texas Constitution, holds rights to water from the Rio Grande Project (Project). HCCRD provides that water to farmers within its jurisdiction in Hudspeth County, Texas, for irrigation use.

As a result of New Mexico's actions in violation of the Rio Grande Compact (Compact), HCCRD receives much less of the water to which it is entitled, and much less water than it would receive if not for such violations.

Accordingly, HCCRD has a significant interest in having the Court deny *New Mexico's Motion to*

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[1] This brief was not authored in whole or in part by counsel for any party, and no party or parties' counsel has made any monetary contribution intended to fund the preparation or submission of this brief. By letter from undersigned counsel, counsel of record for the parties in this case received notice of HCCRD's intent to file this brief.

Dismiss Texas' Complaint and the United States' Complaint in Intervention, filed on April 30, 2014 (Motion to Dismiss), so that the Court may address the merits of the dispute presented, and so that New Mexico may be made to cease its violations of the Compact.

At an earlier stage of this proceeding, HCCRD filed its *Brief of Hudspeth County Conservation and Reclamation District No. 1 as Amicus Curiae in Support of Plaintiff's Motion for Leave to File Complaint* ("HCCRD Brief in Support of Motion to File Complaint"). The primary purpose of the HCCRD Brief in Support of Motion to File Complaint is to explain the history and nature of HCCRD's interest in water from the Project and how those interests are being affected by the diversions of water that are being allowed to occur by New Mexico in violation of the Compact. HCCRD incorporates herein by reference its earlier HCCRD Brief in Support of Motion to File Complaint, including all of the assertions and arguments in that brief.

SUMMARY OF ARGUMENT

The purpose of this amicus curiae brief is to correct New Mexico's misleading suggestion that the only user of Project water in Texas is the El Paso

County Water Improvement District No. 1 (EPCWID).[2] HCCRD also has rights to the Rio Grande via permit from the State of Texas and water from the Project under its Warren Act contract with the United States. HCCRD's ability to divert and use such water is being harmed by the actions of New Mexico in violation of the Compact.

In asserting that the remedy for water not being delivered to Texas is through legal recourse against the United States Bureau of Reclamation (Reclamation), New Mexico again fails to recognize HCCRD's interests. EPCWID and HCCRD have distinct interests

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[2] Under the rules of this Court, no motion for leave to file an amicus curiae brief is necessary if the brief is presented "on behalf of a city, county, town *or similar entity* when submitted by its authorized law officer." SUP. CT. R. 37.4 (emphasis added). As noted above, amicus curiae HCCRD is a conservation and reclamation district of the State of Texas, created under Article XVI, § 59, of the Texas Constitution. Such districts are "political subdivisions of the State, performing governmental functions, and standing upon the same footing as counties and other political subdivisions established by law." *Bennett v. Brown County Water Improv. Dist. No. 1*, 272 S.W.2d 498, 500 (Tex. 1954); *see also Northwest Austin Mun. Utility Dist. No. 1 v. Holder*, 557 U.S. 193, 206 (2009); *El Paso County Water Improv. Dist. No. 1 v. City of El Paso*, 133 F. Supp. 894, 914 (W.D. Tex. 1955), *reformed in accordance with opin.*, 243 F.2d 927 (5th Cir. 1957); *Kirby Lake Development, Ltd. v. Clear Lake City Water Auth.*, 320 S.W.3d 829, 836 (Tex. 2010); *Willacy County Water Control & Improv. Dist. No. 1 v. Abendroth*, 177 S.W.2d 936, 937 (Tex. 1944). HCCRD is therefore covered under Rule 37.4. Moreover, because undersigned counsel is HCCRD's authorized law officer for the purpose of this case, no motion for leave (or consent) is necessary for HCCRD to file this amicus curiae brief.

at stake, which are adversely affected by actions taken by New Mexico in violation of the Compact, and which require protection by the State of Texas. It is up to the State of Texas to ensure that HCCRD's interests, along with EPCWID's interests, are protected through this original action.

ARGUMENT

I. HCCRD, a political subdivision of Texas responsible for providing water for farmers within Hudspeth County, has rights to water from the Project that are being harmed by New Mexico's violations of the Compact.

HCCRD is a political subdivision of the State of Texas located in Hudspeth County and containing 18,618 irrigable acres. HCCRD is responsible for providing water for irrigation to farmers within its jurisdiction in Hudspeth County, Texas. HCCRD receives water from the Project. It holds rights to divert water from the Rio Grande based on a permit from the State of Texas, and has the right to receive water from the Project based on its Warren Act contract with the United States. These rights have been recognized in a judicial decree adjudicating the rights to water in the Upper Rio Grande in Texas. HCCRD may also use the bed and banks of the Rio Grande to convey water from the Project. HCCRD's Amicus Brief in Support of Motion to File Complaint at 3-11. HCCRD's rights to this water are being

harmed by New Mexico's violations of the Compact. Id. at 11.

II. By asserting that the remedy for water not being delivered to Texas should be addressed through legal recourse against Reclamation, New Mexico fails to recognize HCCRD's interests.

New Mexico's Motion to Dismiss refers to the right of EPCWID to the delivery of Project water from Reclamation, and repeatedly asserts that any remedy relating to the failure of such deliveries to occur should be addressed through legal recourse against the United States.[3] In doing so, New Mexico fails to acknowledge that New Mexico's violations of the Compact do not only affect EPCWID and Elephant Butte Irrigation District – the original Project beneficiaries – but the State of Texas generally including HCCRD.[4]

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[3] New Mexico asserts this faulty premise for the purpose of rearguing that alternative fora exist to resolve the dispute raised by the Texas complaint. That position remains incorrect and was denied by the Court when it granted Texas' Motion for Leave to File Complaint.

[4] For example, New Mexico refers to EPCWID as the "Texas District" and states that "[w]hen EPCWID needs water to be delivered to the state line, it calls for that water from Reclamation, and if available, that water is released from the Project." Brief in Support of New Mexico's Motion to Dismiss Texas' Complaint and the United States' Complaint in Intervention at 56, 60.

New Mexico's Motion to Dismiss fails to recognize the entirety of Texas' interest in Rio Grande water. In particular, it fails to acknowledge the existence of HCCRD's rights.

III. This case is not solely about EPCWID's rights.

The State of Texas is seeking relief in this original action pursuant to its rights under the Compact, and not pursuant to EPCWID's contract with Reclamation.

A. The Compact makes clear that its provisions are meant to secure water supply on the Rio Grande in the area that includes HCCRD.

The Compact states, in its first paragraph, that its provisions are "with respect to the use of the waters of the Rio Grande above Fort Quitman, Texas." Rio Grande Compact, Act of May 31, 1939, ch. 155, 53 Stat. 785 (Motion for Leave to File Complaint, App. 1). Water apportioned by the Compact to Texas is allocated, in Texas, pursuant to Texas law. Pursuant to its Warren Act contract with the United States, HCCRD receives a portion of the water allocated to Texas by the Compact.

B. HCCRD has Rio Grande interests that are distinct from those of EPCWID and those interests were taken into account in negotiating the Compact.

HCCRD's water rights derive from two sources, both of which are distinct from EPCWID's contract with the United States. First, HCCRD is authorized to use up to 151,902 acre-feet per year of water from the Project pursuant to a December 1, 1924 Warren Act contract between HCCRD and the United States.[5] Second, HCCRD has the right to divert up to 27,000 acre-feet of water from the Rio Grande in El Paso and Hudspeth Counties to irrigate lands as set forth in Permit No. 236A issued by the Texas Commission on Environmental Quality (TCEQ) and confirmed via Texas' Upper Rio Grande Adjudication by Certificate of Adjudication No. 23-5944.

Reliable sources indicate that HCCRD's interests in the Rio Grande were taken into account and helped shape Texas' position in the negotiations leading to the Compact. The Rio Grande Joint Investigation Report recognized the dependence of the irrigators within HCCRD upon water from the Project and included the water needs of those irrigators in its assessment of the diversions from Elephant Butte

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[5] HCCRD's Warren Act Contract with the United States was amended in 1951. The 1951 amendments added language specifying that the United States could deliver seepage or drainage water from land irrigated within the EPCWID, via canal, to HCCRD.

Reservoir necessary to supply that stretch of the Rio Grande *between the reservoir and Fort Quitman.*[6] The Report noted the importance of the division between the "Upper Rio Grande" above Fort Quitman and the "Lower Rio Grande" below Fort Quitman as follows:

> With respect to usage of water and the problems concerned with that usage, the river is divided into two distinct sections at Fort Quitman, or at the narrow gorge a few miles below. Above this nearly all the water of the river is being consumed by irrigation in Colorado, New Mexico, Texas, and Mexico. Below, in the lower basin, the river develops its flow mainly from tributaries in Mexico.

Rio Grande Joint Investigation Report at 7.

The Rio Grande Joint Investigation Report noted that HCCRD is located within the Elephant Butte-Fort Quitman section of the Upper Rio Grande Basin, and that "maintenance of an adequate water supply for irrigation" of its lands and "maintaining satisfactory control of salinity" were both major problems to be addressed via the Compact. The latter issue of

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[6] The Rio Grande Joint Investigation Report is part of New Mexico's April 30, 2014 "Proposal to Lodge Non-Record Material Under Rule 32.2, Rules of the Court" as an attachment entitled "Natural Resources Committee, Regional Planning, *Part VI – The Rio Grande Joint Investigation in the Upper Rio Grande Basin In Colorado, New Mexico, and Texas, 1936-1937* (1938)."

salinity, in particular, was "an important consideration" in asserting the section's needs. Rio Grande Joint Investigation Report at 7, 12, 23, and 62.

Negotiations over the Compact, which aimed to equitably apportion the river from its headwaters in Colorado to Fort Quitman, Texas, occurred following, and with the backdrop of, the Warren Act contract between the United States and HCCRD, first entered into in 1924, for the provision of surplus or excess water from the Project to HCCRD.

The Rio Grande Joint Investigation Report shows that the amount of use of water from the Project within HCCRD's jurisdiction was factored into the Joint Committee's calculation of the net diversion and stream-flow depletion between 1930 and 1936 for the Elephant Butte to Fort Quitman section of the river. Id. at 103-104. These diversions formed an essential part of the "necessary allowances for drain flow, wastes, arroyo inflow, and salinity control to derive the required diversion demand on Elephant Butte Reservoir." Id. at 103-104. The need to ensure a high-quality supply of water from project lands in Texas to Fort Quitman – including HCCRD – was precisely the reason Texas insisted upon 800,000 acre-feet from Elephant Butte.[7] HCCRD's interests, and the need for

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[7] The calculated diversion demand amounted to 736,000 acre-feet, but citing the amount of acres actually irrigated, 773,000 acre-feet was recommended as a "conservative estimate." Rio Grande Joint Investigation Report at 104.

salinity control, factored into the Compact negotiations resulting in Texas' final allocation.

C. A legal memorandum from Reclamation's Regional Counsel in 1946 confirms HCCRD's firm rights to water from the Project.

A legal memorandum from Reclamation's Regional Counsel to his Regional Director issued in 1946 confirms Reclamation's recognition of its independent obligation to supply water from the Project to HCCRD, unrelated to EPCWID. Memorandum from Spencer L. Baird, Regional Counsel to Regional Director (Feb. 28, 1946) (Baird Memorandum) (App. 1).

The Baird Memorandum addresses the status of HCCRD's Warrant Act contract and the Project's water supply. The memorandum reviews the contract and finds that it is a "firm" contract for the delivery of water to HCCRD at the terminus of the Tornillo main canal. App. 3, 9. It finds that the United States is obliged to deliver "waste return flow, or flood waters in the Rio Grande" to HCCRD under the terms of the contract. App. 9. It concludes that Reclamation must "make good its obligation to [HCCRD] to supply it with the return flow and operational waste water from the project." App. 9-10.

CONCLUSION

This Court should deny the motion to dismiss filed by New Mexico and proceed to hear the merits of this case.

Respectfully submitted,

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June 2014

SLB/er

COPY MCF

February 28, 1946

REGIONAL COUNSEL'S MEMORANDUM 46-56, REGION 5

To: Regional Director

Subject: Hudspeth Irrigation District – Contract and water supply – Rio Grande Project.

1. Reference is made to paragraph 3 of the Commissioner's letter of February 15. By letter of March 17, 1945, to the Superintendent, there was recommended that action on negotiation of a draft of proposed new permanent contract with the Hudspeth County Conservation and Reclamation District No. 1 should await results of the investigations then pending. The draft of proposed new permanent contract should now be amended in the light of further studies made by the Regional Director to comprehend additional works for the benefit of the district, such as will prevent hostile diversion of waters of the Rio Grande on the Mexican side and also provide a means of use of drain and return flow waters from the project proper in quality such as is hoped will be suitable for irrigation.

2. In my opinion, an amended contract with the district is highly desirable, as preventing a continuation of the procedure followed over a long period of years in the making of annual supplemental contracts having for their sole purpose the determination of charges in a definite amount, due to the United

States from the district each year for the water service rendered under its Warren Act contract of December 1, 1924.

3. The Hudspeth County Conservation and Reclamation District No. 1, hereinafter referred to as the district, comprises some 20,000 acres lying below the lands of the project proper, and which are riparian to the Rio Grande River above Fort Quitman. Before entering into a contract with the United States for a water supply under date of December 1, 1924, this district diverted water for the irrigation of some 10,000 acres under irrigation, directly from the Rio Grande, but due to hostile diversion on the Mexican side, its water supply was not very reliable and it made a determined effort to have its lands made a part of the project as an additional division thereof, and to have such lands served by the same works which served the lands in the so-called Tornillo section of the El Paso County Water Improvement District No. 1. It is understood that because of the fact that there were some excess land ownerships in the district, one of which is understood to have been approximately 1,500 acres, the Bureau declined to consider the proposal, but in lieu thereof, gave favorable consideration to supplying it with water surplus to the project needs, in the character of return flow water from the project operational and drainage wastes, under the provisions of the Warren Act. These demands on the Bureau by the district must have been quite insistent, for there does not appear to be any difference in principle in refusing to furnish the

district with a water supply as a division of the project because there are in the district, lands which due to excess ownership, were not eligible to receive water under the Reclamation Act proper, and furnishing the identical supply to the same lands under the provision of the Warren Act.

4. Be that as it may, the United States did, on December 1, 1924, enter into the Warren Act contract in question on a firm basis, and under which the United States undertook to:

> " * * * deliver to the district at the terminus of the Tornillo Main canal, during the irrigation season of 1925 and thereafter during each irrigation season as established on the Rio Grande Project, such water from the project as may be available at said terminus without the use of storage from Elephant Butte reservoir. The secretary of the Interior shall be at all times the sole judge of the availability of such water. The rental of water hereunder is secondary and inferior to the right to use water for any purpose on the lands of the Rio Grande Federal Irrigation Project. In consideration of such rental the District hereby relinquishes all right, title, interest and claim to any and all waters of the Rio Grande, except as herein provided."

5. We think that the contract by its own terms as above quoted, provides that water service shall be upon a firm basis, and the supplemental contracts entered into thereafter from year to year, do not have for their purpose the creation of any

additional obligation on the part of the United States other than that fixed in the contract of December 1, 1924, but merely provide the payment required of the district for years subsequent to 1925, for as you will note, the article following that just above quoted in the contract (being Article 7), provides for payment of a specific amount for water deliveries for the irrigation season of 1925, but for subsequent seasons, the amount to be paid by the district is provided in the contract as follows:

> " * * * for the delivery of water thereafter, (after the irrigation season of 1925) the district shall pay to the United States, on each December 1, such a charge per acre-foot, to be fixed annually by the Secretary of the Interior, as shall return to the United States, six per centum on the construction cost per acre of such project works as affect the district water supply hereunder, plus a proper, proportionate share of the cost of operating and maintaining such project works. The decision of the Secretary of the Interior in fixing such charges shall be final and conclusive."

6. Under this provision it is believed that the Secretary had the power without a supplemental contract to fix the charges due from the district for irrigation seasons subsequent to 1925, and his only obligation therein was that his determination should bear a close relation to the formula outlined in the above quoted portion of Article 7 of the contract, and the only ground for attacking such determination

would be, that it was made arbitrarily and without any relation to any such formula. It is believed that the making of a supplemental contract each year to cover the price for the water service furnished is primarily a matter of convenience to the United States in having of record a consent by the district, to the determination so made, as well as the consent of the two districts comprising the Rio Grande Project which have an interest in the Warren Act contract with the district.

7. As to the water supply to which the district is entitled under the contract of 1924, in my opinion, this is a firm contract and even though it specifically provides that the availability of operational wastes and return flow from the project works shall be in the discretion of the Secretary, such operational waste and return flow could not be reduced by efficient operation, to the point where the district would be deprived of all water. In other words, it is believed necessary to read the contract of December 1, 1924, in the light of the conditions existing on the project at that time, for by such contract the district altered its position and accepted water deliveries from the United States and gave up its interest in the flood waters of the Rio Grande for, and in lieu of the water supply being furnished under the Warren Act contract. At the time this contract was entered into it must have been apparent to the Bureau and to the two districts in the project that there was ample return flow and uncontrollable project waste water available to the district by reason of the method of

operation of the project works, and it must have been in the minds of the parties that such water supply would remain available from year to year and on a firm basis. If such facts were not apparent, it is believed that the Secretary abused his discretion in determining that there was and probably would be sufficient return flow from the project to supply the Warren Act contract over a sufficient period of years to justify the project lands in absorbing their prorata share of any shortage during the comparatively few years when there would not be sufficient water to supply all the project lands and the Warren Act contractor with a full water supply.

8. The matter of determination of whether or not there is water for sale in excess of the project needs under the Warren Act of February 21, 1911, involves an exercise of discretion on the part of the Secretary, for storage "in excess of the requirements on the lands to be irrigated under any project" available for sale under the Warren Act does not in my opinion constitute waters which may be excess and available from year to year, but is intended to mean waters which from reliable water supply studies will be available for firm sale and use under the Warren Act over a period of years. For example, if the water studies on the project show that in 23 out of 25 years there will be water sufficient to supply the requirements of the project lands and in addition enough to supply a Warren Act contractor, it is believed that the Secretary is justified in the exercise of his discretion, in determining that there are excess waters available

for sale under the Warren Act and in the two years when the water supply may fall short of meeting the full requirements of both the project land and the Warren Act lands, he may prorate the available water to meet the requirements of both.

9. On the other hand, if such water supply studies show that there would be waters in excess of the project needs available but 2 out of 25 years, in my opinion, it would be an abuse of discretion under the Warren Act for the Secretary to enter into a Warren Act contract for the sale of such so-called excess waters, for by entering into such a contract under these circumstances he would be leading the Warren Act contractor to believe that a permanent water supply was available for his lands and cause him to make a development on the basis of such a belief.

10. I fully appreciate the fact that the contract of 1924 is specific in its limitations as to the water supply available for the district under the Warren Act. However, I have known of instances where the contracts of the government to supply water were expressly limited to 3 acre-feet per annum, and yet the delivery of larger quantities of water over a long period of years when such water was available in excess of the project needs, induced the courts to ignore the specific contract limitation and to enlarge the same to the extent to which water was actually furnished over such long period of years. The particular instance I have in mind is the experience of the

Bureau on the Sunnyside Division of the Yakima Project.

11. It is understood that the condition at the headworks for the district have been changed since the execution of this contract:

(a) By the International Boundary Commission (American section) River Rectification Project, and

(b) By demands of the Tornillo Division of the project.

The rectification project is understood to have changed the course of the river and to make the flood, waste and surplus waters in the river more vulnerable to hostile diversion in Mexico than they were before the river was straightened. These works are understood to have placed drain and return flow water from the project beyond the control of the Bureau and into the rectified channel of the Rio Grande, where diversions thereof are being made on the Mexican side. It is also understood that in the past several years there have been objections by lands in the Tornillo section of the project to the use of large quantities of drain waters because of their mineral content, and that such lands have demanded a mixing of a larger proportion of project storage water with the drain waters because the owners of such lands maintained that they were entitled to the same quality of water as that furnished any other project lands. It is believed that such demands are not justified in that the United States is entitled to

make available to lands in the lower end of any project, such of the return flow as may come from irrigation of lands in the higher section, so long as the quality of water delivered to the lower lands is not seriously objectionable for irrigation purposes. Nor is it believed necessary for the United States to supply the lands in the Tornillo division of the project with any better quality of water than that which it undertakes to supply its Warren Act contractor.

12. In the past several years it is also understood that the district has reestablished its Alamo diversion works in the Rio Grande and has been diverting large quantities of water available in the river which together with the water in its heading from the Tornillo canal has aggregated approximately 6.01 acre feet [sic] per acre.

13. In my opinion, it makes no difference where the waste return flow, or flood waters in the Rio Grande may be delivered to the district except, of course, that sufficient must be delivered through headworks out of the Tornillo canal, to supply the district lands above the lower heading of the district in the river.

14. The two districts comprising the project may not override the exercise of discretion in the Secretary, to determine whether or not at the lower end of the project proper there is sufficient water to supply a Warren Act contractor on a firm basis, however, since the districts are obligated to pay the construction obligation of the project it has been the

practice to require the two districts to consent not only to the basic contact with the Hudspeth District, but also to the so-called supplemental contracts executed from year to year. However, the interest of the Bureau in dispensing of water, excess to the project needs in the way of return flow and drainage water, is identical with the interest of the project districts, for any credits accruing to the United States under the Warren Act contract are applied on the contract obligation of the two project districts to the United States for construction charges.

15. If, as I am informed, the construction of the river rectification project by the International Boundary Commission has made water surplus to the project needs in the river formerly available for the Hudspeth District vulnerable to hostile diversion on the Mexican side, it would seem to me that such agency would have the responsibility of restoring conditions in the rectified channel as they theretofore existed with respect to the ability of the United States to make good its obligation to the district to supply it with return flow and operational waste water from the project.

16. In summary it is my opinion:

(a) That the United States should enter into a contract amendatory of the contract of December 1, 1924, to supply the district with excess water as defined in the basic contract.

(b) That such contract should provide for the construction of works either by the

Bureau or by the International Boundary Commission (American section) necessary to provide the district with water available to it before the River Rectification Project of the International Boundary Commission was constructed, and for the conservation of project return flow and drainage water, the quality of which may be suitable for irrigation of the lands in the Tornillo Section of the project proper, and the district lands by adulteration with project storage.

(c) That such contract provide for delivery to a point or points agreeable to the United States and the district at a fixed charge such as will return the cost of the additional construction, and provide a credit to the project construction charges, and an actual operation and maintenance charges based upon an equitable allocation of costs of operation and maintenance of structures essential to the delivery of water to the district under the terms of such contract.

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Spencer L. Baird